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No. 81-112

In the Supreme Court of the United States

OCTOBER TERM, 1980

BARRY DEAN MICHAEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the warrantless installation and monitoring of an electronic tracking device (a "beeper") on the exterior of his vehicle violated his Fourth Amendment rights.

Petitioner was charged, in a two-count indictment returned in the United States District Court for the Northern District of Georgia, with unlawfully manufacturing and possessing a controlled substance, methylenedioxyamphetamine, with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and with

conspiracy to distribute it, in violation of 21 U.S.C. 846.

Following a pretrial hearing, the district court sustained petitioner's motion to suppress evidence seized from a warehouse under a search warrant. It did so on the ground that this evidence had been discovered by Drug Enforcement Agents through the warrantless installation of a beeper on the exterior of petitioner's rented van. Initially, a panel of the court of appeals, relying in part on the panel opinion in *United States* v. *Holmes*, 521 F.2d 859 (5th Cir. 1975), affirmed the district court (Pet. App. 1b-21b; 622 F.2d 744 (1980)). On rehearing en banc, the court of appeals, in a 16 to 8 decision, reversed the suppression order and remanded for trial (Pet. App. 1a-47a; 645 F.2d 252 (1981)).

Petitioner contends (Pet. 5-12) that the court of appeals erred in suppressing the evidence that derived from the use of the "beeper." Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress the evidence. If petitioner is acquitted following a trial on the merits, his claims will be moot. If, on the other hand, petitioner is convicted, he will then be able to present his present contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *American Construction Co.* v. *Jack-*

sonville, T. & K.W. Ry., 148 U.S. 372, 384-388 (1893); see *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

AUGUST 1981

[1] Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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